

FILED
OCT 15 1990

JOSEPH E. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

CALIFORNIA PUBLIC UTILITIES COMMISSION,
Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF RESPONDENT
CALIFORNIA ENERGY COMMISSION
IN SUPPORT OF PETITIONER**

WILLIAM M. CHAMBERLAIN *
JONATHAN BLEES
CALIFORNIA ENERGY COMMISSION
1516 Ninth Street
Sacramento, California 95814
(916) 324-3237

* Counsel of Record

October 15, 1990

REX E. LEE
CARTER G. PHILLIPS
GENE C. SCHAEER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Section 7(k) of the Pacific Northwest Electric Power Planning and Conservation Act ("the Act") authorizes the Federal Energy Regulatory Commission ("FERC") to hold an evidentiary hearing in reviewing rates set by the Bonneville Power Administration ("BPA").

2. Whether the Act authorizes BPA to charge California purchasers of nonfirm electricity the fully allocated costs of BPA's system, when those purchasers do not enjoy benefits of the system proportional to those enjoyed by Northwest firm power customers.



TABLE OF AUTHORITIES

Cases	Page
<i>Bonneville Power Admin.</i> , 23 FERC § 61,161 (1983)	9
<i>California Energy Comm'n v. BPA</i> , 909 F.2d 1298 (9th Cir. 1990)	2, 5
<i>California Energy Resources and Dev. Comm'n v. BPA</i> , 831 F.2d 1467 (9th Cir. 1987), <i>cert. denied</i> , 109 S. Ct. 58 (1988)	5
<i>Central Lincoln Peoples' Utility Dist. v. Johnson</i> , 735 F.2d 1101 (9th Cir. 1984)	8
<i>Chevron, USA v. NRDC</i> , 467 U.S. 837 (1984)	8
<i>Department of Water, and Power of Los Angeles v. BPA</i> , 759 F.2d 684 (9th Cir. 1985)	5
<i>Minnesota Power & Light Co.</i> , 11 FERC ¶ 61,312 (1980)	6
<i>Municipal Light Bds. v. Boston Edison Co.</i> , 53 F.P.C. 1545 (1975)	6
<i>Ohio Power Co. v. FERC</i> , 880 F.2d 1400 (D.C. Cir. 1989), <i>cert. granted sub nom. Arcadia, Ohio v. Ohio Power Co.</i> , 110 S. Ct. 1522 (1990) ..	8
<i>Opinion 250</i> , 36 FERC ¶ 61,335 (1986)	4
<i>SEC v. Chenery</i> , 332 U.S. 194 (1947)	9, 10
<i>Southern California Edison Co. v. Jura</i> , 909 F.2d 339 (9th Cir. 1990)	2
<i>Wisconsin Public Serv. Corp.</i> , 25 FERC ¶ 61,101 (1983)	6
Statutes	
Bonneville Project Act of 1937, ch. 720, 50 Stat. 720 (codified at 16 U.S.C. §§ 832 <i>et seq.</i>)	3
§ 832c	3
Flood Control Act of 1944, ch. 665, 58 Stat. 887 (codified in scattered sections of 16, 33 and 43 U.S.C.)	
16 U.S.C. § 825s	2, 7
Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94 Stat. 2697 (codified in scattered sections of 16 U.S.C.)	3

TABLE OF AUTHORITIES—Continued

	Page
§ 837a	3
§ 837c	3
§ 838d	4
§ 839e(k)	8

Legislative Materials

H.R. Rep. No. 590, 88th Cong., 2d Sess., <i>reprinted</i> in 1964 U.S. Code Cong. & Admin. News 3342....	4
---	---

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-505

CALIFORNIA PUBLIC UTILITIES COMMISSION,
Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION, *et al.,*
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF RESPONDENT
CALIFORNIA ENERGY COMMISSION
IN SUPPORT OF PETITIONER**

Although it has elected not to file its own petition for certiorari in this particular case, respondent California Energy Commission ("CEC") supports the petition filed by the California Public Utilities Commission ("Petitioner").

The decision below is one of a series of decisions by the Ninth Circuit upholding actions of the Bonneville Power Administration ("BPA") that disfavor California energy consumers and favor Northwest power inter-

ests in violation of statutory requirements. In the decision below, the Ninth Circuit has held that BPA's rates to California utilities need not be "fair and reasonable," as required by 16 U.S.C. §§ 829e(k) & 825s, and that BPA may therefore charge California utilities a proportional share of all of its costs even though it provides a substantially lower grade of service to those utilities than it provides to its Northwest firm power customers. Even more important, the decision below has vitiated the procedures for special review of such rates by the Federal Energy Regulatory Commission ("FERC")—procedures prescribed by Congress in an effort to protect California against BPA's recognized regional bias. In another decision, the same panel of the Ninth Circuit has also held that BPA is free to engage in undue discrimination against California consumers because, in the panel's view, no statute expressly prohibits such discrimination. *Southern California Edison Co. v. Jura*, 909 F.2d 339, 343-44 (9th Cir. 1990). And in a third decision, the Ninth Circuit has upheld another BPA order which grants preferential treatment to Northwest utilities in the provision of transmission services and restricts competition among those utilities, thereby further inflating the wholesale electricity prices paid by California utilities. *California Energy Comm'n v. BPA*, 909 F.2d 1298 (9th Cir. 1990).

In sum, the Ninth Circuit is systematically eliminating most or all of the protections California energy consumers had received from Congress when it provided for the development of the Bonneville power system. Sooner or later this Court must act to correct this imbalance. To assist the Court in deciding whether this is the appropriate time for this Court to act, the CEC will initially sketch the history of the BPA and explain the bases for the CEC's claim that the BPA is discriminating regionally. The CEC will then discuss the two issues presented in this specific case and their importance to the CEC. The Court certainly could use this case as a

vehicle to begin the process of correcting the errors of the Ninth Circuit, but at a minimum, it must act soon to restore the protections to which California consumers are plainly entitled under the relevant statutes.

1. The BPA was created to market electrical power generated by various taxpayer-funded and federally-owned dams on the Columbia River. See 16 U.S.C. §§ 832 *et seq.* It acquired the ability to sell power to California in 1969 with the completion of the Pacific Intertie ("Intertie"), a large transmission facility that links the Pacific Northwest and Canadian power markets with the California power market. The Intertie is used, not only to transmit BPA power, but also to transmit power produced by public and private Northwest and Canadian utilities to California. BPA owns and operates almost all of the northern end of the Intertie, which gives it effective control over virtually all transmission of electricity—generated by itself or by others—from the Pacific Northwest to California. Like the dams from which the BPA obtains its power, the portion of the Intertie owned by BPA was financed by federal taxpayer dollars. The southern portion was paid for by California utilities and their ratepayers.

Prior to the authorization and construction of the Intertie, Northwest interests objected to it because they feared it would enable California municipal utilities to obtain priority rights to inexpensive BPA power under the statutory preference enjoyed by publicly-owned utilities. See, *e.g.*, 16 U.S.C. § 832c. This political problem was resolved by a compromise measure, enacted as part of the Pacific Northwest Electric Power Planning and Conservation Act ("Pacific Northwest Act"), which mandated a limited "regional preference" in favor of the Northwest. That measure restricted the sale of federal energy outside the Northwest to "surplus energy," *i.e.*, electricity for which BPA had no market in the Northwest. 16 U.S.C. §§ 837c, 837a. This compromise pro-

tected the Northwest's first call on BPA power while allowing BPA to generate additional revenues by selling power to California that otherwise would be wasted. See H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin. News 3342, 3343-44.

In the years since this compromise was enacted, however, BPA has gradually transmuted this limited regional preference in the *purchase* of BPA power into a blanket authorization—indeed, a mandate—to disfavor California and favor the Northwest in virtually every other respect as well. The BPA, moreover, uses the additional revenues it gains from this discrimination to reduce electricity charges in the Northwest, rather than remitting those additional revenues to the federal Treasury. See Opinion 250, 36 FERC ¶ 61,335 at 61,819 n.9 (1986). The net result is a large and unwarranted diversion of wealth from California to Northwest consumers and utilities.

The most serious example of the BPA's unfair treatment of California consumers is a BPA policy that is not yet before this Court: BPA's policy for allocating excess transmission capacity on the Intertie—i.e., capacity in excess of that needed to transmit federal power and power obtained under a federal treaty with Canada. In 1974, Congress directed BPA to make excess Intertie capacity available to "*all* utilities" on a "fair and non-discriminatory" basis. 16 U.S.C. § 838d (emphasis added). For the next ten years, BPA gave this provision its plain, common-sense interpretation: Except in unusual circumstances, the BPA made excess Intertie capacity available to all utilities from whatever region on a competitive, first-come-first-served basis. The result was that Northwest utilities were forced to compete with each other and with Canadian utilities in selling much of their excess power to California.

In 1984, however, the BPA adopted a new, interim Intertie Access Policy ("Interim Policy") designed to

protect Northwest utilities from competition among themselves and with Canadian utilities. Under that policy, the BPA granted Northwest utilities the right to transmit all of their own surplus energy (plus any power they can purchase from other utilities) on the Intertie before Canadian and California utilities could have any direct access to that facility. In most circumstances, moreover, the BPA also allocated access *among* the Northwest utilities so that they could not compete with one another. As a result of this policy, the Intertie has become an instrument for the economic exploitation of California utilities and their customers—the very parties who had constructed and paid for the southern portion of the Intertie.¹

The BPA recently replaced its Interim Policy with a virtually identical Long Term Intertie Access Policy that has just recently been upheld by the court of appeals.² Like its predecessor, the new policy is a plain and unwarranted violation of the BPA's duty to allocate excess Intertie capacity on a "fair and nondiscriminatory" basis. See *supra* note 1.

¹ Relying heavily upon the fact that the BPA's policy had not yet become permanent, the court of appeals denied petitions for review of the Interim Policy. *Department of Water and Power of Los Angeles v. BPA*, 759 F.2d 684, 689 (9th Cir. 1985); *California Energy Resources and Dev. Comm'n v. BPA*, 831 F.2d 1467, 1478-79 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 58 (1988). Judge Norris dissented. He observed that the BPA's allocation policy "creates a cartel for the Northwest utility companies in the sale of power to the Southwest." 831 F.2d at 1479. According to Judge Norris, "The anticompetitive, pro-Northwest utility slant of the pro rata intertie access plan seems plainly incompatible with the statutory language requiring that the BPA be 'fair and nondiscriminatory' in its treatment of *all* utilities." *Id.* (emphasis in original).

² On July 26, 1990, a panel of the Ninth Circuit issued a decision approving this permanent intertie policy. *California Energy Comm'n v. BPA*, 909 F.2d 1298 (9th Cir. 1990). Rehearing was denied on October 5, 1990. CEC anticipates that it will seek review of that decision in this Court.

2. The rate order approved by the decision below is yet another example of the BPA's unauthorized inter-regional discrimination. BPA provides two types of electric service. "Firm" power is power that BPA is obligated to provide. It is available upon demand, without interruption, and is sold primarily to Northwest utilities. "Nonfirm" power, by contrast, is power that BPA is not obligated to sell, and which it can therefore interrupt at any time. For that reason, nonfirm power is a far lower quality of service than firm power. BPA sells primarily nonfirm power to California.

The amount of generating capacity that any electric utility—including the BPA—must maintain depends only upon the amount of firm power it is obligated to sell to its customers. Thus, under standard "cost-causation" principles of ratemaking, firm customers are typically charged a rate that reflects the full capital costs of the utility's generating capacity.³ Nonfirm customers, on the other hand, are charged a lower rate to reflect the fact that their usage does not obligate the utility to maintain any particular level of generating capacity.

The BPA rate order at issue here represents a marked departure from these principles because it requires non-firm customers in California to pay rates that reflect the entire fully-allocated costs (including capital costs) incurred by the BPA in servicing all of its customers.⁴ By forcing California consumers to bear costs which they did not cause to be incurred, the BPA's rate schedule

³ See, e.g., *Wisconsin Public Serv. Corp.*, 25 FERC ¶ 61,101 at 61,325 (1983); *Minnesota Power & Light Co.*, 11 FERC ¶ 61,312 at 61,648 (1980); *Municipal Light Bds. v. Boston Edison Co.*, 53 F.P.C. 1545, 1563 (1975).

⁴ Thus, for example, nonfirm rates charged to California customers include the fully-allocated costs of BPA's investment in the ill-fated nuclear power plants of the Washington Public Power Supply System ("WPPSS"), even though (i) those plants were not yet in service during the period at issue, and (ii) California customers would never have had equal access to the power produced by those plants.

unfairly forces California consumers to subsidize electricity prices in the Northwest.

The court of appeals' decision to approve the BPA's discriminatory rate order is wrong. Section 825s of the Flood Control Act specifically requires that rate schedules for the sale of all BPA power "shall be drawn having regard to the recovery . . . of the cost of producing and transmitting such electric energy," and that federal power shall be made available "on fair and reasonable terms and conditions." 16 U.S.C. § 825s. The court of appeals' approval of the BPA's order, however, is expressly premised upon the court's conclusion that Section 825s does not, in fact, impose a "fair and reasonable" ratemaking standard, and that the BPA is therefore *not* required to follow ordinary ratemaking principles in setting nonfirm rates.

The only basis for this conclusion is the court's assertion that Section 825s "does not refer to ratemaking *per se*, but rather to the overall requirement of fairness in the *delivery* of power by the BPA." Pet. App. A-17 (emphasis added). But that interpretation is contrary to the plain statutory language, not to mention common sense, for two reasons. *First*, Section 825s expressly encompasses "rate schedules." *Second*, that provision requires, without limitation, that *all* "terms and conditions" for the sale of federal power be "fair and reasonable." It is not limited to the "delivery" of power. The rate charged for electricity is obviously one of the "terms"—if not the most important term—of any contract for the sale of electricity. In short, there is simply no basis for permitting the BPA to escape normal ratemaking principles.⁵

⁵ The decision below on this issue is also wrong for the reasons stated in the petition for certiorari. Pet. 13-18. The CEC did not submit its own petition on this issue because, during the rate period in question, BPA was not able actually to recover its fully allocated costs. For that reason, it did not appear necessary to challenge the Ninth Circuit's holding at this time.

3. The court of appeals' holding that FERC lacked authority to hold a hearing in this case also warrants review because it will eliminate a vital check on the unauthorized discrimination against California practiced by the BPA. Recognizing BPA's natural tendency to be biased in favor of the Northwest, Congress enacted Section 7(k) of the Pacific Northwest Act (16 U.S.C. § 839e(k)), which provides for plenary review by the FERC of BPA "rates or rate schedules" applicable to nonfirm energy sold outside the Northwest. *Central Lincoln Peoples' Utility Dist. v. Johnson*, 735 F.2d 1101, 1113 (9th Cir. 1984). That section's plain language requires an opportunity for an independent ratemaking hearing by the FERC: Although Section 7(k) states that the FERC's review must be "*based on the record of proceedings*" before the BPA, it also provides that the parties to a FERC review proceeding "*shall be afforded an opportunity by the Commission for an additional hearing in accordance with the procedures established for rate-making by the Commission . . .*" *Id.* (emphasis added).

Notwithstanding the plain statutory language, the court of appeals rejected the FERC's interpretation of Section 7(k)—an interpretation that should be entitled to judicial deference⁶—and held that the FERC is barred by that provision from conducting any independent fact-finding. This holding is incorrect for the reasons stated in the petition for certiorari. Pet. 9-13.

⁶ *E.g.*, *Chevron, USA v. NRDC*, 467 U.S. 837 (1984). BPA argued before the FERC (but not in the court of appeals) that FERC should not hold an evidentiary hearing. Although the court of appeals did not purport to defer to the BPA's interpretation, the parties who challenged FERC's interpretation below strongly relied upon BPA's interpretation in urging the court of appeals to reverse the FERC on this point. Inasmuch as it involves conflicting interpretations of an important federal statute by two federal agencies, this case presents a deference issue analogous to that presented in *Ohio Power Co. v. FERC*, 880 F.2d 1400 (D.C. Cir. 1989), *cert. granted sub nom. Arcadia, Ohio v. Ohio Power Co.*, 110 S. Ct. 1522 (1990).

The court of appeals' holding has ramifications far beyond this case because it impairs the FERC's ability to prevent further interregional discrimination by the BPA. Plenary review by the FERC is the only protection California consumers have against unfair treatment. Under the decision below, however, the record of BPA's hearing—in which BPA selects and pays for the hearing officer, presents its own case, and drafts and adopts its own findings and conclusions—will be the sole source of evidence for FERC's review proceeding. Obviously, that limitation makes FERC ratemaking review more akin to judicial review than to the plenary review envisioned by Congress.

The hearing issue also has substantial practical importance in this case. Even if the court of appeals was correct in holding that the FERC lacked authority to hold an additional hearing, the proper course was to remand to the FERC so that it could exercise its statutory responsibility to review the BPA's rates in the first instance. A remand is especially important in light of the FERC's holding, acknowledged by the court of appeals (Pet. App. A-21), that it could *not* sustain the BPA's rates on the basis of the record compiled by the BPA. *Bonneville Power Admin.*, 23 FERC § 61,161 at 61,354 (1983). The court of appeals' decision to affirm the FERC's order on a ground not asserted—indeed, expressly disavowed—by the FERC is a stark violation of fundamental principles of administrative law. See, *e.g.*, *SEC v. Chenery*, 332 U.S. 194, 196 (1947).

Thus, if this Court were to agree with the court of appeals that the FERC lacked authority to hold an additional hearing, the decision below must, at a minimum, be vacated and the case remanded to the FERC. On the other hand, if the Court agrees with the petitioner (and CEC) that the FERC has this authority (and if the Court does not reverse the decision below on another ground), the proper course would be to affirm, but on the alternative ground that the FERC has authority to hold

an additional hearing and that it properly relied upon the additional evidence it amassed in this case.

In any event, it cannot be the proper resolution of this case simply to deny the petition and leave both the *Chenery* problem and the issue of FERC's authority to hold an additional hearing left unresolved. What makes the practical effect of the decision below particularly acute—and therefore worthy of review at this time—is that the Ninth Circuit is the only court that can review FERC decisions involving BPA rate orders. Thus, the protection against regional bias that an independent FERC hearing provides will be lost completely unless the FERC refuses to acquiesce in the decision below. That, obviously, would place the FERC in an awkward position in any future judicial review of a similar rate order. The better course would be for this Court to resolve the issue now.⁷

* * * * *

In sum, the two issues presented in the petition for certiorari are important questions of federal law which ought to be resolved by this Court. They directly affect millions of California consumers of electricity, forcing those consumers to subsidize their counterparts in the Pacific Northwest. And, inasmuch as the Ninth Circuit has exclusive jurisdiction over all appeals involving BPA orders, no direct circuit conflict could possibly arise as to the issues presented here or, indeed, any other issues of discrimination by the BPA. For that reason, review should be granted.

⁷ CEC did not petition for certiorari on this issue because it was not clear that the CEC would necessarily benefit from a reversal of the court of appeals' holding on the issue in *this* case. Given that the FERC ultimately approved the rate order at issue here, a holding that the FERC was entitled to base its decision on the additional evidence taken during the FERC's own hearing would not change the result. It is the policy of the CEC to bring to this Court only issues of immediate legal *and* practical significance to the CEC. This issue, in the CEC's view, did not qualify under that strict standard.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

WILLIAM M. CHAMBERLAIN *
JONATHAN BLEES
CALIFORNIA ENERGY COMMISSION
1516 Ninth Street
Sacramento, California 95814
(916) 324-3237

* Counsel of Record

October 15, 1990

REX E. LEE
CARTER G. PHILLIPS
GENE C. SCHAERR
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000